

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 KARL PHILIP JOHNSON,

12 Plaintiff,

13 vs.

14 CITY OF SAN DIEGO, et al.,

15 Defendants.

CASE NO. 08cv887 WQH (WMC)

**ORDER**

HAYES, Judge:

16 The matter before the Court is the Motion to Dismiss and Motion to Strike the First  
17 Amended Complaint (Doc. # 18).

18 **Background**

19 This action arises out of an incident which occurred on May 20, 2006, when Defendants  
20 Jamie Fitzpatrick and Frank Wilson, police officers of Defendant San Diego Police  
21 Department, arrested, handcuffed, and placed Plaintiff in the back of their patrol vehicle.  
22 Plaintiff alleges that he was placed in the patrol vehicle without a required seatbelt or other  
23 safety restraint; that the patrol vehicle was involved in an accident with another vehicle; and  
24 that Plaintiff sustained injuries as a result of not being placed in a seatbelt or restraint system.

25 ///

26 ///

27 ///

28 ///

1 On November 13, 2007, Plaintiff filed a “notice of petition and petition for order  
2 relieving petitioner from provisions of Government Code, section 945.4<sup>1</sup> and allowing the  
3 filing of a late claim” (“Petition”) in the Superior Court of California, County of San Diego  
4 (Doc. # 18, Exhibit C). Plaintiff attached to the Petition a copy of a Claim for Damages (“State  
5 Complaint”), which Plaintiff filed in the Superior Court of California, County of San Diego  
6 on May 16, 2007.<sup>2</sup> The State Complaint alleged the following causes of action: (1) negligence;  
7 (2) false imprisonment; (3) illegal search and seizure; (4) invasion of privacy; (5) negligent  
8 infliction of severe emotional distress; (6) negligent entrustment; (7) permissive use; (8)  
9 violation of due process and equal protection; and (9) violation of federal and state  
10 constitutional and statutory rights. On December 19, 2007, the California Superior Court  
11 denied the Petition on grounds that Plaintiff failed to establish that the failure to timely present  
12 a government tort claim to the City of San Diego was through mistake, inadvertence, surprise,  
13 or excusable neglect; and that the application presented to the City for leave to present a late  
14 claim was not presented within a reasonable time. *Id.*, Exhibit E. On February 13, 2008,  
15 Plaintiff appealed the denial of the Petition to the California Court of Appeal. *Id.*, Exhibit F.  
16 On June 24, 2008, the California Court of Appeal dismissed the appeal on grounds that  
17 Plaintiff failed to file a brief after notice was given. *Id.*, Exhibit G.

18 On May 19, 2008, Plaintiff initiated the action presently before this Court by filing a  
19 complaint against the City of San Diego, the San Diego Police Department, and San Diego  
20 Police Officers Jamie Fitzpatrick and Frank Wilson (Doc. # 1). On May 8, 2009, Plaintiff filed  
21 a first amended complaint (“FAC”) (Doc. # 16). The FAC alleges the following causes of  
22 action: (1) illegal search and seizure; (2) invasion of privacy; (3) cruel and unusual  
23 punishment; and (4) violation of federal and state constitutional and statutory rights.

---

24  
25  
26 <sup>1</sup> Section 945.4 of the California Government Code requires that a party file a government tort  
27 claim prior to initiating a lawsuit against a public entity for causes of action for which a claim is  
28 required.

<sup>2</sup> The Court will refer to the Petition and State Complaint collectively as the “State Action.”

1 In support of the first cause of action for illegal search and seizure, the FAC alleges that  
2 Fitzpatrick and Wilson, “under color of law and in deliberate indifference to plaintiff’s health,  
3 safety and rights, and without a warrant and without probable cause, unlawfully stopped and  
4 detained plaintiff, searched his person, clothing and belongings, and improperly placed and  
5 held him handcuffed in a moving police vehicle without lap and shoulder belts.” *FAC*, ¶ 12.  
6 The FAC alleges that Plaintiff did not consent to any such search, seizure or transport. The  
7 FAC alleges that Defendants “deprived plaintiff of the following clearly established and well-  
8 settled constitutional rights:” (1) “[f]reedom from illegal and warrantless searches and  
9 seizures;” (2) “[f]reedom from summary punishment;” (3) “[f]reedom from the use of illegal,  
10 excessive, unreasonable, unnecessary and/or outrageous search procedures;” and (4) “[d]ue  
11 process and equal protection in handling, treatment and transportation.” *FAC*, ¶ 13.

12 In support of the second cause of action for invasion of privacy, the FAC alleges that  
13 Fitzpatrick and Wilson “invaded plaintiff’s right of privacy” by “stopping, arresting, searching  
14 and otherwise interfering with plaintiff without probable cause, a warrant, excuse or  
15 justification.” *Id.*, ¶ 17. The FAC alleges that plaintiff did not consent to the search or other  
16 acts by Defendants, and “submitted to said defendants’ acts only because he was afraid, was  
17 ordered to submit by said defendants who were acting under color of their authority and under  
18 color of the statutes, ordinances, regulations, customs and practices of the State of California,  
19 the City of San Diego and the San Diego police department.” *Id.*, ¶ 18. The FAC alleges that  
20 Defendants’ “conduct constituted illegal and warrantless searches and arbitrary intrusions by  
21 defendants, and each of them, upon plaintiff’s belongings, privacy and body, thereby depriving  
22 plaintiff of life, liberty, and property without due process of law.” *Id.*, ¶ 20.

23 In support of the third cause of action for cruel and unusual punishment, the FAC  
24 alleges that Fitzpatrick and Wilson “handcuffed plaintiff, over tightened said cuffs so as to hurt  
25 plaintiff, and placed plaintiff in the rear of their police vehicle without a lap and shoulder belt  
26 in deliberate indifference to plaintiff’s rights, health, safety and well being.” *Id.*, ¶ 23. The  
27 FAC alleges that plaintiff “suffered injury and damage to his face, jaw, neck, back, mind,  
28 body, arms, legs, and nervous system, embarrassment, severe emotional distress and as yet

1 additional unascertained injuries and damages” as a result of Defendants’ unlawful conduct.  
2 *Id.*, ¶ 24.

3 In support of the fourth cause of action for violation of federal and state civil,  
4 constitutional and statutory rights, the FAC alleges: “This action is brought pursuant to the  
5 provisions of 42 U.S.C. [s]ections 1981, 1983, 1985 and 1986, pursuant to The Americans  
6 With Disabilities Act and pursuant to California Civil Code, Sections 51, 52 and 52.1.” *Id.*,  
7 ¶ 29. The FAC alleges that “[b]y reason of being handcuffed plaintiff was effectively rendered  
8 disabled and could not care for or protect himself,” and that “by reason of handcuffing and  
9 disabling plaintiff, placing him in a moving vehicle without the safety of seatbelt restraints and  
10 otherwise improperly transporting plaintiff, defendants, and each of them, deprived plaintiff  
11 of his rights as secured by the Americans With Disabilities Act, the Fourteenth Amendments  
12 of the United States Constitution and as further secured by the California Constitution and  
13 statutes.” *Id.*, ¶ 32.

14 On May 28, 2009, Defendants filed the Motion to Dismiss and Strike the FAC (Doc.  
15 #18). Defendants move to dismiss the FAC pursuant to Rule 12(b)(6) of the Federal Rules of  
16 Civil Procedure, and strike portions of the FAC pursuant to Rule 12(f) and (g). On July 1,  
17 2009, Plaintiff filed a Response in Opposition to the Motion to Dismiss and Strike (Doc. # 19).  
18 On July 7, 2009, Defendants filed a Reply (Doc. # 20).

### 19 Standard of Review

20 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests  
21 the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.  
22 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where  
23 the factual allegations do not raise the right to relief above the speculative level. *See Bell*  
24 *Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be  
25 dismissed for failure to state a claim where the allegations plausibly show that the pleader is  
26 entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule  
27 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and  
28 must accept as true all material allegations in the complaint, as well as any reasonable

1 inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003);  
 2 *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

### 3 Analysis

#### 4 **I. The *Rooker-Feldman* Doctrine**

5 Defendants contend that Plaintiff is a state-court loser seeking to re-litigate his case in  
 6 federal court because the California Superior Court denied the Petition, and the California  
 7 Court of Appeal dismissed Plaintiff's appeal. Defendants contend that this Court cannot "pass  
 8 upon Plaintiff's claims without reviewing, relying on and/or reversing a California state court  
 9 decision that rendered judgment in favor" of Defendants. *Id.* at 8. Defendants contend that  
 10 "[a]ll three requirements for the application of the *Rooker-Feldman* doctrine are satisfied in  
 11 this case" because (1) Plaintiff was a party to the State Action; (2) Plaintiff alleged the same  
 12 claims in the State Complaint and the action presently before this Court; and (3) the two  
 13 actions did not parallel one another. *Mot. to Dismiss*, p. 5-7. Defendants move to dismiss the  
 14 FAC on grounds that the *Rooker-Feldman* doctrine bars this action.

15 Plaintiff contends that the FAC "does not invite the federal court to review and reverse  
 16 the state court's ruling." *Opposition*, p. 4. Plaintiff contends that the claims alleged in the  
 17 FAC "were not entertained" in the State Action. *Id.* Plaintiff contends that the *Rooker-*  
 18 *Feldman* doctrine does not apply because this is not an instance where Plaintiff has "filed a  
 19 complaint in district court *appealing* to the district court to review a state court's ruling." *Id.*  
 20 (emphasis in original).

21 *Rooker-Feldman* "is a narrow doctrine, confined to 'cases brought by state-court losers  
 22 complaining of injuries caused by state-court judgments rendered before the district court  
 23 proceedings commenced and inviting district court review and rejection of those judgments.'" *Lance v. Dennis*, 546 U.S. 459, 464 (2006) (quoting *Exxon Mobil v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005)). The "doctrine applies only in 'limited circumstances,' *Exxon Mobil, supra*, at 291, 125 S. Ct. 1517, where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court." *Lance*, 546 U.S. at 466. The Ninth Circuit follows the following formulation for *Rooker-Feldman*:

1 If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by  
 2 a state court, and seeks relief from a state court judgment based on that decision,  
 3 *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on  
 4 the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act  
 5 or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction. If  
 6 there is simultaneously pending federal and state court litigation between the  
 two parties dealing with the same or related issues, the federal district in some  
 circumstances may abstain or stay proceedings; or if there has been state court  
 litigation that has already gone to judgment, the federal suit may be claim-  
 precluded under § 1738. But in neither of these circumstances does *Rooker-*  
*Feldman* bar jurisdiction.

7 *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003). The district court lacks jurisdiction under  
 8 *Rooker-Feldman* if “the federal plaintiff [is] seeking to set aside a state judgment,” whereas  
 9 there is jurisdiction if the federal plaintiff “present[s] some independent claim, albeit one that  
 10 denies a legal conclusion that a state court has reached in a case to which he was a party[.]”  
 11 *Id.* (quoting *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993)).

12 A review of the record demonstrates that the California Superior Court denied the  
 13 Petition, and that the California Court of Appeal dismissed Plaintiff’s appeal of the denial of  
 14 the Petition. The FAC, however, does not seek to set aside the denial of the Petition by the  
 15 California Superior Court, or the dismissal of Plaintiff’s appeal by the California Court of  
 16 Appeal. The FAC does not allege “as a legal wrong an allegedly erroneous decision by a state  
 17 court,” or seek relief from a state court judgment based on that allegedly erroneous decision.  
 18 *Noel*, 341 F.3d at 1164. Instead, the FAC seeks to recover damages for alleged unlawful  
 19 conduct by Defendants, which is “not a basis for abstaining under the *Rooker-Feldman*  
 20 doctrine.” *Id.* The Court concludes that *Rooker-Feldman* does not bar Plaintiff’s claims.

## 21 **II. Collateral Estoppel (Issue Preclusion) and Res Judicata (Claim Preclusion)**

22 Defendants contend that the “issues and causes of action are the same in both” the State  
 23 Action and the action before this Court; that the “issues were actually litigated and/or there was  
 24 a final judgment on the merits;” that “Plaintiff was a party in both the [State Action and the  
 25 action before this Court];” and that “the prior decision was rendered by a court of competent  
 26 jurisdiction because it was rendered by the state trial court in and for the county of San Diego.”  
 27 *Mot. to Dismiss*, p. 10-12. Defendants contend that the “elements for barring this action  
 28 pursuant to the doctrines of res judicata and collateral [estoppel] have been established.” *Id.*

1 at 12.

2 Plaintiff contends that the California Superior Court “order denying plaintiff’s petition  
3 for relief from the claims presentation statutes was not a final judgment . . . because an appeal  
4 was pending” and “there was no judgment on the merits.” *Opposition*, p. 5-6. Plaintiff  
5 contends that “the state court’s refusal to hear state and/or federal claims does not preclude the  
6 federal court from hearing federal claims over which it has original/subject matter jurisdiction  
7 and which were not heard on the merits.” *Id.* at 6.

8 A. Collateral Estoppel/ Issue Preclusion

9 The doctrine of collateral estoppel bars re-litigation of issues of fact or law that were  
10 litigated in a prior proceeding. *Robi v. The Five Platters, Inc.*, 838 F.2d 318, 322 (9th  
11 Cir.1988). For collateral estoppel to apply, the following elements must be satisfied: (1) the  
12 issue must be identical to that decided in the prior proceeding; (2) the issue must have been  
13 actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in  
14 the prior proceeding; (4) the decision must have been final and on the merits; and (5)  
15 preclusion must be sought against a person who was a party or in privity with a party to the  
16 prior proceeding. *Alvarez v. May Dep’t Stores*, 143 Cal. App. 4th 1223, 1233 (2006). Even  
17 where the “minimal requirements” for collateral estoppel are satisfied, “the doctrine should not  
18 be applied if considerations of policy or fairness outweigh the doctrine’s purposes as applied  
19 in a particular case.” *Bostick v. Flex Equipment Co.*, 147 Cal. App.4th 80, 97 (2007). It is the  
20 defendant’s burden to demonstrate that the doctrine of collateral estoppel applies. *See Schiro*  
21 *v. Farley*, 510 U.S. 222 (1994).

22 The record demonstrates that the California Superior Court denied the Petition on  
23 grounds that Plaintiff failed to establish that his failure to timely file a government tort claim  
24 was due to mistake, inadvertence, surprise or excusable neglect; and that application for leave  
25 to present a late claim was not presented within a reasonable time. The record demonstrates  
26 that the California Court of Appeal dismissed Plaintiff’s appeal of the denial of the Petition for  
27 failure to file a brief. The record in this case, however, does not demonstrate that the  
28 California Superior Court addressed any of the issues of fact or law underlying the State



1 Action. Furthermore, the record does not demonstrate the judgment has been entered in the  
 2 State Action. The Court concludes that Defendants have failed to demonstrate that the issues  
 3 in the FAC have been litigated in the State Action; that the issues in the FAC have been  
 4 decided in the State Action; or that a decision was rendered in the State Action that was final  
 5 and on the merits. *See Alvarez*, 143 Cal. App. 4th at 1233. The Court concludes that the  
 6 doctrine of collateral estoppel does not bar this action.

7 B. Res Judicata/ Claim Preclusion

8 Pursuant to the doctrine of res judicata, “a valid, final judgment on the merits precludes  
 9 parties or their privies from relitigating the same cause of action in a subsequent suit.” *San*  
 10 *Diego Police Officers’ Ass’n v. San Diego City Employees’ Retirement System*, 568 F.3d 725,  
 11 734 (9th Cir. 2009) (quoting *Le Parc Cmty. Ass’n v. Workers’ Comp. Appeals Bd.*, 110 Cal.  
 12 App.4th 1161 (2003)). “Thus three requirements have to be met: (1) the second lawsuit must  
 13 involve the same cause of action as the first one, (2) there must have been a final judgment on  
 14 the merits in the first lawsuit and (3) the party to be precluded must itself have been a party,  
 15 or in privity with a party, to that first lawsuit.” *San Diego Police Officers’ Ass’n*, 568 F.3d at  
 16 734. The party asserting res judicata has the burden to demonstrate that its requirements are  
 17 met. *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404 (9th Cir. 1985).

18 As previously discussed, the record does not demonstrate that there has been a final  
 19 judgment on the merits in the State Action, or that the state courts addressed the merits of the  
 20 claims alleged in the State Complaint. Furthermore, the causes of action and underlying  
 21 factual allegations in the State Complaint are different from the causes of action and factual  
 22 allegations in the FAC. The FAC alleges claims for violation of Plaintiff’s federal  
 23 constitutional rights; the record does not demonstrate that the state courts addressed  
 24 Defendants’ alleged violation of Plaintiff’s federal constitutional rights. The Court concludes  
 25 that Defendants have not demonstrated that there has been a “valid, final judgment on the  
 26 merits” that precludes Plaintiff and Defendants “from relitigating the same cause of action in  
 27 a subsequent suit.” *San Diego Police Officers’ Ass’n*, 568 F.3d at 734 (internal quotations  
 28 omitted). The Court concludes that the doctrine of res judicata does not bar this action.



1 **III. Immunity Pursuant to Sections 820.4, 821, and 821.6 of the California**  
2 **Government Code**

3 Defendants contend that the FAC “alleges that the law enforcement defendants were  
4 at all relevant times officers of the San Diego Police Department; . . . that these defendants  
5 were at all relevant times in uniform and acting within the scope of their employment as police  
6 officers;” and that “the alleged conduct at issue is the arrest of Mr. Johnson for some unknown  
7 charge.” *Mot. to Dismiss*, p. 14. Defendants contend that the San Diego Police Department  
8 and its officers are immune from liability for all acts alleged in the FAC pursuant sections  
9 820.4, 821, and 821.6 of the California Government Code.

10 Section 820.4 provides that “[a] public employee is not liable for his act or omission,  
11 exercising due care, in the execution or enforcement of any law.” Cal. Gov’t. Code § 820.4.  
12 Section 821.6 of the California Government Code provides that “[a] public employee is not  
13 liable for injury caused by his instituting or prosecuting any judicial or administrative  
14 proceeding within the scope of his employment.” *Id.*, § 821.6. Section 821 provides that “[a]  
15 public employee is not liable for an injury caused by his adoption of or failure to adopt an  
16 enactment or by his failure to enforce an enactment.” *Id.*, § 821.

17 In light of the allegations in the FAC that Fitzpatrick and Wilson acted with deliberate  
18 indifference, acted intentionally, and acted either maliciously or with reckless disregard to  
19 Plaintiff’s rights, Defendants have not demonstrated that they are entitled to immunity at this  
20 stage of the proceedings under section 820.4 of the California Government Code on grounds  
21 that they exercised due care in the execution or enforcement of the law. Defendants are not  
22 immune under section 821.6 because the FAC does not allege that Plaintiff’s injury was caused  
23 by a public employee instituting or prosecuting a judicial or administrative proceeding.  
24 Defendants are not immune under section 821 because the FAC does not allege that Plaintiff’s  
25 injury was caused by a public employee’s adoption of or failure to adopt an enactment, or by  
26 his failure to enforce an enactment. In light of the foregoing, the Court concludes that the  
27 Defendants are not immune from liability for the acts alleged in the FAC under sections 820.4,  
28 821 and 821.6 of the California Government Code.

1 **IV. First, Second and Third Causes of Action for Violation of 42 U.S.C. Section 1983**

2 42 U.S.C. section 1983 provides a cause of action against any person who, under the  
3 color of state law, deprives any citizen of any rights, privileges, or immunities secured by the  
4 Constitution and laws of the United States. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992). “The  
5 purpose of § 1983 is to deter state actors from using the badge of their authority to deprive  
6 individuals of their federally guaranteed rights and to provide relief to victims if such  
7 deterrence fails.” *Id.*

8 The first, second and third causes of action allege that Defendants, acting under the  
9 color of state law, violated Plaintiff’s federal rights to be free from illegal searches and  
10 seizures; from invasion of privacy; and from cruel and unusual punishment.

11 A. First, Second and Third Causes of Action Against Defendants City of San Diego  
12 and San Diego Police Department

13 Defendants contend that “[s]tarkly absent from the FAC is any mention of a custom  
14 adopted by the City or the Police Department that was responsible for Plaintiff’s alleged  
15 Constitutional injuries.” *Mot. to Dismiss*, p. 13. Defendants contend that the FAC “makes no  
16 mention of any policy adopted by the City or the Police Department that would give rise to an  
17 injury of Plaintiff’s rights by other Defendants.” *Id.* Defendants contend that the first, second  
18 and third causes of action should be dismissed because “there is not a single allegation in the  
19 FAC regarding any custom, policy and/or practice.” *Id.*

20 “[A] local governmental body cannot be found liable under § 1983 on a respondeat  
21 superior theory; liability may be imposed only if the plaintiff establishes that his injuries were  
22 inflicted pursuant to an official county policy or custom.” *Thompson v. City of Los Angeles*,  
23 885 F.2d 1439, 1443 (9th Cir. 1989); *see also Monell v. Department of Social Services*, 436  
24 U.S. 658, 690-94 (1978). To hold a municipality or a police department liable for the actions  
25 of its officers, a plaintiff must demonstrate a constitutional deprivation, and that the  
26 deprivation was caused pursuant to a municipality or police department custom or policy.  
27 *Monell*, 436 U.S. at 694; *Munger v. Glasgow Police Dept.*, 227 F.3d 1082, 1087 (9th Cir.  
28 2000).

1 The only allegation in the FAC with respect to a custom or policy is that Defendants  
 2 “were acting under color of their authority and under color of the statutes, ordinances,  
 3 regulations, customs and practices of the State of California, the City of San Diego and the San  
 4 Diego police department.” *Complaint*, ¶ 18. This allegation, however, is vague and  
 5 conclusory. The FAC does not describe with any specificity the allegedly deficient custom or  
 6 policy. The FAC does not allege any facts to support a finding that Plaintiff’s alleged  
 7 constitutional injury was caused pursuant to a custom or policy of the City of San Diego or the  
 8 San Diego Police Department. In light of the foregoing, the Court concludes that the FAC fails  
 9 to state a section 1983 claim against the City of San Diego and the San Diego Police  
 10 Department. *See Monell*, 436 U.S. 658. The Court dismisses the first, second and third causes  
 11 of action against the City of San Diego and the San Diego Police Department.

12 B. First, Second and Third Causes of Action Against Individual Officer Defendants  
 13 Fitzpatrick and Wilson

14 As previously discussed, Defendants Fitzpatrick and Wilson are not immune from suit  
 15 under sections 820.4, 821 or 821.6 of the California Government Code. The Motion to  
 16 Dismiss does not assert any other basis for dismissing the first cause of action for illegal search  
 17 and seizure and second cause of action for invasion of privacy against Fitzpatrick and Wilson.  
 18 With respect to the third cause of action for cruel and unusual punishment, Defendants contend  
 19 that the FAC fails to state a claim on grounds that the Eighth Amendment protection against  
 20 cruel and unusual punishment protects only those already convicted of a crime, and the FAC  
 21 does not allege that Plaintiff has been convicted of a crime.

22 “While the eighth amendment proscribes cruel and unusual punishment for convicted  
 23 inmates, the due process clause of the fourteenth amendment proscribes any punishment of  
 24 pretrial detainees.” *Redman v. County of San Diego*, 942 F.2d 1435, 1441, n.7 (9th Cir. 1991).  
 25 The FAC does not allege that Plaintiff was a convicted prisoner; instead that FAC alleges that  
 26 Plaintiff was subject to cruel and unusual punishment during his arrest, which does not support  
 27 a cause of action for cruel and unusual punishment. The Court concludes that the FAC fails  
 28 allege facts to support a claim for cruel and unusual punishment against Fitzpatrick and

1 Wilson. The Court dismisses the third cause of action for cruel and unusual punishment  
2 against Fitzpatrick and Wilson.

3 **V. Fourth Cause of Action for Violation of Federal and State Constitutional and**  
4 **Statutory Rights**

5 The FAC alleges that the fourth cause of action for violation of federal and state  
6 constitutional and statutory rights is “brought pursuant to the provisions of 42 U.S.C. [sections]  
7 1981, 1983, 1985, 1986, pursuant to the provisions of the Americans With Disabilities Act and  
8 pursuant to California Civil Code, Sections 51, 52 and 52.1.” FAC, ¶ 29.

9 A. 42 U.S.C. Section 1981

10 42 U.S.C. section 1981 provides that all persons shall have equal rights under the law,  
11 and forbids discrimination on the basis of race in making contracts. *See* 42 U.S.C. § 1981;  
12 *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 625 (9th Cir. 1988). To survive a  
13 motion to dismiss, a section 1981 claim must allege plaintiff suffered discrimination on the  
14 basis of race. *Id.* (citing *Jones v. Bechtel*, 788 F.2d 571, 574 (9th Cir. 1986)). The FAC does  
15 not allege that Defendants discriminated against Plaintiff on the basis of his race in making  
16 contracts. The FAC fails to allege sufficient facts to support a claim under 42 U.S.C. section  
17 1981.

18 B. 42 U.S.C. Section 1983

19 The Court has addressed Plaintiff’s claims that Defendants, acting under the color of  
20 state law, violated Plaintiff’s federal rights by conducting an illegal search and seizure; by  
21 invading Plaintiff’s privacy; and by subjecting Plaintiff to cruel and unusual punishment. The  
22 FAC does not allege any other basis for liability under 42 U.S.C. section to warrant denial of  
23 the Motion to Dismiss the fourth cause of action.

24 C. 42 U.S.C. Section 1985

25 42 U.S.C. section 1985 provides a cause of action for conspiracy to interfere with civil  
26 rights. *See* 42 U.S.C. § 1985. A claim under section 1985 “must allege facts to support the  
27 allegation that defendants conspired together. A mere allegation of conspiracy without factual  
28 specificity is insufficient.” *Karim-Panahi*, 839 F.2d at 626 (internal quotations omitted). The

1 FAC does not allege that Defendants conspired to interfere with Plaintiff's civil rights. The  
 2 Court concludes that the FAC fails to allege sufficient facts to support a claim under 42 U.S.C.  
 3 section 1985.

4 C. 42 U.S.C. Section 1986

5 Section 1986 provides that "no action under the provisions of this section shall be  
 6 sustained which is not commenced within one year after the cause of action has accrued." *See*  
 7 42 U.S.C. § 1986. The FAC alleges the arrest occurred May 20, 2006. *FAC*, ¶ 12. The  
 8 original complaint in this action was filed May 19, 2008, approximately two years later. The  
 9 Court concludes that Plaintiff's claim for violation of 42 U.S.C. section 1986 is barred as  
 10 untimely.

11 D. Americans with Disabilities Act

12 The ADA states that "[n]o individual shall be discriminated against on the basis of  
 13 disability in the full and equal enjoyment of the goods, services, facilities, privileges,  
 14 advantages, or accommodations of any place of public accommodation by any person who  
 15 owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 1218(a)  
 16 The FAC does not allege that Plaintiff was disabled at the time that the incident underlying this  
 17 action, or that Plaintiff was discriminated against on the basis of his disability. The Court  
 18 concludes that the FAC fails to allege sufficient facts to support a claim for violation of the  
 19 ADA.

20 E. California Civil Code Sections 51, 52, and 52.1

21 The Unruh Civil Rights Act, codified at sections 51, *et seq.*, of the California Civil  
 22 Code, like the ADA, protects against discrimination on the basis of disability. Cal. Civ. Code  
 23 §§ 51, *et seq.* As discussed, the FAC does not allege that Plaintiff was disabled at the time of  
 24 the incident underlying this action, or that Plaintiff was discriminated against on the basis of  
 25 disability. The Court concludes that the FAC fails to allege sufficient facts to support a claim  
 26 for violation of sections 51, 52 or 52.1 of the California Civil Code.

1           G.     Conclusion

2           In light of the foregoing, the Court concludes that the FAC fails to allege facts to  
3 support a claim under 42 U.S.C. sections 1981, 1983, 1985, and 1986, under the ADA, or  
4 under sections 51, 52, or 52.1 of the California Civil Code. The Court dismisses the fourth  
5 cause of action for violation of federal and state constitutional and statutory rights against all  
6 Defendants for failure to state a claim.

7     **VI.    Motion to Strike Punitive Damages**

8           Defendants request that the Court strike Plaintiff's request for punitive damages.  
9 Defendants' request is moot with respect to the City of San Diego and San Diego Police  
10 Department because the Court has dismissed all claims against the City of San Diego and the  
11 San Diego Police Department. To the extent Defendants move to strike Plaintiff's request for  
12 punitive damages against the Officers Fitzpatrick and Wilson, the Court concludes that striking  
13 the request for punitive damages against Fitzpatrick and Wilson is not proper at this stage of  
14 the proceedings. *Dubner v. City & County of San Francisco*, 266 F.3d 959, 969 (9th Cir.  
15 2001) ("Punitive damages are available against individual officers in a § 1983 claim . . . where  
16 the officers' conduct is shown to be motivated by evil motive or intent, or when it involves  
17 reckless or callous indifference to the federally protected rights of others."). In light of the  
18 foregoing, the Court denies the Motion to Strike Punitive Damages.

19     **VII.   Leave to Amend**

20           If Plaintiff wishes to file an amended complaint, Plaintiff may file a motion for leave  
21 to file a second amended complaint, which attaches a copy of the proposed second amended  
22 complaint.  
23

24                             Conclusion

25           IT IS HEREBY ORDERED that the Motion to Dismiss and Motion to Strike the First  
26 Amended Complaint (Doc. # 18) is **GRANTED in part**. All causes of action against the City  
27 of San Diego and San Diego Police Department are **DISMISSED**. The third cause of action  
28 for cruel and unusual punishment and fourth cause of action for violation of federal and state

1 constitutional and statutory rights against Jamie Fitzpatrick and Frank Wilson are  
2 **DISMISSED.**

3 DATED: August 13, 2009

4   
5

6 **WILLIAM Q. HAYES**  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28